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CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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STATE OF FLORIDA,

Petitioner,

vs.

VON DEE GRAGG

Respondent.

---

On Writ of Certiorari to the
Supreme Court of the
State of Florida

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# PETITION FOR WRIT OF CERTIORARI

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I

WHETHER THE FLORIDA SUPREME COURT ERRED IN HOLDING THE DECISION OF THIS COURT IN JEFFERS v. UNITED STATES, 432 U.S. 137 (1977) INAPPLICABLE TO THE INSTANT CASE WHERE THE RESPONDENT WHO SUCCESSFULLY SOUGHT A SEVERANCE OF COUNTS IN AN INFORMATION THEREAFTER INVOKED THE FIFTH AMENDMENT DOCTRINE OF COLLATERAL ESTOPPEL TO PRECLUDE HIS TRIAL ON THE SEVERED COUNT?

II

WHETHER THE FLORIDA SUPREME COURT, BY REJECTING THE HOLDING OF JEFFERS v. UNITED STATES 432 U.S. 137 (1977) AS DICTA, HAS RAISED A SUBSTANTIAL FEDERAL QUESTION AS TO THE APPLICATION OF COLLATERAL ESTOPPEL TO CRIMINAL CASES WHERE IT IS THE DEFENDANT WHO HAS AFFIRMATIVELY PREVENTED A SINGLE TRIAL ON ALL PENDING CHARGES?

III

WHETHER THE FLORIDA COURTS ERRED IN HOLDING COLLATERAL ESTOPPEL APPLIED TO A FACT NOT NECESSARILY DETERMINED IN THE RESPONDENT'S FIRST TRIAL, THUS CREATING CONFLICT WITH FEDERAL DECISIONS AND DECISIONS OF THIS COURT?

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## PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Florida petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Florida.

## OPINIONS BELOW

The decision of the Supreme Court of Florida was rendered on April 7, 1983. Gragg v. State, ___ So.2d ___, Fla.S.Ct. No. 61, 854, (Op. filed 4-7-83). It is not yet reported, but is reproduced in the Appendix, pages A-1 through A-17.

The prior decision of the District Court of Appeal of the State of Florida, Fourth District, was rendered on February 10, 1982. State v. Gragg, 409 So.2d 1127 (4th DCA Fla.1982).

## BASIS FOR INVOKING JURISDICTION

The opinion of the Supreme Court of

Florida was rendered on April 7, 1983. This Petition is timely filed within 60 days of that date, pursuant to Rule 20.1, Rules of the Supreme Court of the United States.

Jurisdiction is invoked pursuant to 28 USC § 1257(3).

## FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ...Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law...

## STATEMENT OF THE CASE

The Respondent was charged in a three count information with the offenses of aggravated battery by the use of a firearm (Count I), possession of a firearm by a convicted felon (Count 2), and aggravated assault by use of a firearm (Count 3). These charges arose from a single episode. Prior to trial, the Respondent sought and was granted a severance of Count II, possession of a firearm by a felon, on the ground that proof of his prior felony conviction, an essential element of Count II, would be prejudicial to him in the trial of the

other counts.

The case proceeded to trial on Counts I and III. The victim, one Joe HARRISON, testified he had been living with a woman named Mary Smith for about six months and on May 5, 1980, he decided to move out of her house. (T 138, 142) This decision caused an argument with Ms. Smith (T 138, 142) When Mr. Harrison subsequently arrived at his own residence, he was encountered outside by the Respondent, who was, according to Harrison, an ex-boyfriend of Mary Smith. (T 131-132, 139) According to Harrison, the Respondent jumped on him and pistol whipped him with a .32 or .38 chrome plated revolver (T 146, 148-149) The

Respondent let him up and then beat him a second time with his fists (T 150) The physician who treated Mr. Harrison testified his injuries were consistent with being hit with a blunt object, which could have been a ring or a pistol (T 70, 78) The following day when the Respondent was arrested there was a gun cleaning kit in plain view on the front seat of his car (T 98-101)

The Respondent testified he had had a fight with Harrison (T 329-330), but he denied using a weapon (T 326). His wife testified she owns a gun which is kept at home (T 307). Mary Smith testified she had told the Respondent about her problems with Harrison and he decided to

speak to him (T 262). She testified she had seen the Respondent with a gun, in January, 1980, but he didn't have one the night of the incident. (T 263)

During its deliberations, the jury submitted a question to the court: "Does the Defendant have to have had a gun to be guilty of the information of charge of aggravated assault? Also aggravated battery?" (R 16) The trial judge advised the jury that due to the phrasing of the information, it would have to find a gun was used to convict the Respondent of the aggravated battery. (T 456) The jury returned verdicts of guilty of the lesser included offenses of battery and assault. (R 17-18)

The Respondent then moved to dismiss Count II of the information on the ground that trial on that charge, possession of a firearm by a convicted felon, was barred by collateral estoppel. (R 2) The trial court entered an order granting the motion and the Petitioner appealed to the Fourth District Court of Appeal of Florida. That Court considered both grounds argued by the Petitioner for reversal. The Petitioner argued that collateral estoppel was inapplicable because the issue of possession of the gun was not determined in the first trial and alternatively, that the Respondent, by moving to sever Count II, had waived application of collateral estoppel.

The Petitioner specifically relied on the decision in Jeffers v. United States, 432 U.S. 137 (1977).

The Court of Appeal found that collateral estoppel did apply because the jury had, by its verdicts, found that the Respondent neither used nor possessed a gun in perpetrating the assault and battery. However, the Court accepted the Petitioner's alternative argument and held, based on Jeffers v. United States, 432 U.S. 137 (1977), that since the Respondent had moved for a severance, he could not claim the benefit of collateral estoppel. Because of the novelty of the issue, the Court certified to the Florida Supreme Court as a matter of great public

interest the question: When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available?

The Respondent, pursuant to the certified question, sought and was granted review in the Florida Supreme Court. In its brief on the merits, the present Petitioner again argued both that the issue of possession of the gun was not determined in the first trial so collateral estoppel is inapplicable and that the Respondent's action of seeking the severance operated as a waiver of his

collateral estoppel claim. The Florida Supreme Court, in a 4 - 2 opinion, rejected both arguments. It held the district court had correctly concluded that the jury actually decided the Respondent didn't have a gun, so collateral estoppel applied. In response to the certified question, the Court held a defendant is not estopped from asserting collateral estoppel as a defense to a charge after having sought and been granted a severance of the charge from other charges. The Court held Jeffers v. United States, 432 U.S. 137 (1977) was not dispositive because it was a plurality opinion and merely dicta, and in this case the Respondent should not have to waive one

right or order to assert another.

The instant Petition for Writ of Certiorari follows.

## REASONS FOR GRANTING THE PETITION

### I

By holding that Jeffers v. United States, 432 U.S. 137 (1977) is applicable to the instant case, where the Respondent first successfully sought a severance of counts in an information and thereafter invoked the Fifth Amendment doctrine of collateral estoppel to preclude his trial or the severed count, the Florida Supreme Court has decided a Federal question in conflict with a decision of this Court.

There is no question that the Respondent was properly charged with the three offenses in a single information, since they were based on the same transaction. Had charges remained joined and

the jury returned with the same verdicts of guilty of simple assault and battery and also convicted the Respondent of possession of a firearm by a felon, the Respondent would not have been entitled to an acquittal on Count II. It is well settled that inconsistent verdicts in a single trial do not form the basis for reversal of a conviction. Dunn v. United States, 284 U.S. 390 (1932), nor does collateral estoppel apply to verdicts of guilt or innocence rendered in a single trial. United States v. Benfield, 593 F2d 815 (8th Cir.1979).

Accordingly, the Petitioner in the case sub judice relied on this Court's decision in Jeffers v. United States,

432 U.S. 137 (1977) to support its position that sine it was the Respondent who received the benefit of the severance, it would be inequitable for him to turn it to seek an advantage, which, had the charges remained joined, would not be available. In Jeffers, this Court held that where the defendant had opposed the prosecutor's efforts to try pending charges in one proceeding, his actions deprived him of any double jeopardy claim that one charge was actually a lesser offense of the other. The Fourth District Court of Appeal of Florida agreed with the Petitioner's analysis and held "by logical extension, Jeffers is authority for our present holding that

appellee [Respondent] cannot now claim the benefit of collateral estoppel."

The Florida Supreme Court, however, while recognizing that Jeffers was on point, declined to follow it for two reasons. First, it held the holding in Jeffers was merely dicta because it was a plurality opinion and second, because it concluded in this case the Respondent should not have to waive one right, severance, to obtain another. The State Supreme Court's decision is thus in clear conflict with Jeffers and the State of Florida should be granted a summary reversal. The situation presented in this case is substantially the same as in Jeffers; in both instances it was the

actions of the defendant that prevented the prosecution of all the charges in the same trial. Although in Jeffers joinder was opposed and in this case a severance was sought, the Florida Supreme Court drew a distinction which really is one without a difference. By expressly declining to follow Jeffers the Florida Supreme Court has decided a Federal question in a way in conflict with an applicable decision of this Court. Certiorari should be granted. Rule 17(1)(c), Rules of the Supreme Court of the United States.

II

The Florida Supreme Court, if it correctly stated the holding of

> Jeffers v. United States, 432 U.S. 137 (1977) is dicta, has raised a substantial Federal question as to the application of collateral estoppel to criminal cases where it is the defendant who has affirmatively prevented a single trial on all pending charges.

If it is true, as the Florida Supreme Court held, that Jeffers v. United States, 432 U.S. 137 (1977), is not an authoritative decision of this Court but merely dicta, then the lower Court's decision has raised a substantial Federal question which ought to be decided by this Court.

In Ashe v. Swenson, 397 U.S. 436 (1970), Justice Brennan's concurring opinion noted that the decision would have the effect of requiring prosecutors to join at one trial all the charges against a defendant that grew out of a

single criminal transaction. Chief Justice Burger, dissenting, noted the trend in the law to allow severance and predicted the decision would allow a defendant's second, third, fourth criminal acts to be "free" unless he was tried for the multiple crimes in a single trial, something defendants use every legal device to avoid and often succeed in avoiding. The decision in the instant case by the Florida Supreme Court shows that Chief Justice Burger's fears have been realized, while the majority's concern that charges arising from a single criminal episode be joined was thwarted by the Respondent and not the prosecutor.

The government should be granted an opportunity to try all of its charges against a defendant. If the defendant can successfully obtain a severance, and it seems he can, (see Panzavecchia v. Wainwright, 658 F.2d 357 (5th Cir.1981); State v. Vazquez, 419 So.2d 1088 (Fla. 1982)), it is not the government that should be penalized when the defendant seeks to invoke collateral estoppel on a charge he insisted upon severing. This Court should therefore grant certiorari review and determine whether the Respondent's act of seeking a severance results in a waiver of collateral estoppel. The instant case has implications beyond the case itself; the issue of whether col-

lateral estoppel is barred by a defendant's motion to sever is one which is likely to arise often, and unless it is decided, prosecutors are likely to be unable to try defendants for criminal charges. As the Florida First District Court of Appeal once observed, "counsel representing the State and Defendant in criminal cases should not be permitted to play games with each other for the purpose of seeing which one can manipulate the procedural course of the case in such manner as will secure the greatest advantage to himself." Eagle v. State, 249 So.2d 460 (1 DCA Fla. 1971).

The Petitioner respectfully urges this Court to grant certiorari to decide

the substantial Federal question which has been raised by the decision of the Florida Supreme Court. Rule 17(1)(c) Rules of the Supreme Court of the United States.

III

The Florida Courts by holding collateral estoppel applicable in the instant case, created conflict with Federal decisions and decisions of this Court.

The Florida Courts at both the trial and appellate levels held that prosecution of the Respondent on Count II of the information was precluded by collateral estoppel because the jury had found him guilty of lesser offenses on Counts I and III. In those two Counts, the Respondent was charged with using a

firearm to commit aggravated battery and assault. Count II required only proof of possession of a firearm by a person who has previously been convicted of a felony. The jury's verdicts on Counts I and III did not amount to a finding that the Respondent did not possess a gun; they found only that he did not use it to bludgeon (batter) or threaten (assault) Harrison.

In Ashe v. Swenson, 397 U.S. 436 (1970), six men playing poker together were robbed. The defendant was tried for robbing one of the six victims. At the trial, the only issue was identity. The defendant was acquitted. The State then brought him to trial for robbery of a second victim and the second time he was

convicted. The Court held the second prosecution was barred by collateral estoppel because the only issue--identity--had been conclusively determined in the defendant's favor at the first trial.

In the instant case, unlike Ashe v. Swenson, the possession charge was markedly different from the battery and assault charges, which require actual use and not mere possession of a weapon. Therefore, collateral estoppel should not have been applied to preclude prosecution on Count II. Moreover, since the Respondent's motion to dismiss was granted, there was no trial on Count II and therefore, there was no accurate way for the State courts to determine whether the

Respondent was entitled to invoke collateral estoppel. Only the record of the first trial on Counts I and III was available for examination. Cf, Simpson v. Florida, 403 U.S. 384 (1971).

The federal cases in this area of the law hold that when a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of the issue. United States v. Lee, 622 F.2d 787 (5th Cir. 1980); United States v. Ballard, 586 F.2d 1060, 1064-1066 (5th Cir. 1978). As this Court recognized in Standefer v. United States, 447 U.S. 10 (1980) [where it held the civil doctrine of nonmutual collateral

estoppel inapplicable to criminal cases], a jury's decision to return verdicts on lesser charges may arise from compassion, compromise, or exercise of its pardon power. The Florida Supreme Court in fact acknowledged that "there does seem to be some evidence to support the view that the jury exercised its pardon power." However, it held this evidence was not relevant to whether collateral estoppel applies.

The lower court's decision thus conflicts with Federal authority in several respects: (1) It applied collateral estoppel although only the issue of use of the gun and not mere possession was determined in the first trial; (2) It

decided the issue on an inadequate record since a trial on Count II never took place; and (3) It used an unduly stringent standard in deciding whether collateral estoppel applied. The Petitioner urges this Court to grant certiorari review to resolve the conflict and to clearly define the standards by which collateral estoppel may be invoked.

## CONCLUSION

Wherefore, based on the foregoing reasons and authorities cited therein, the Petitioner, the State of Florida, respectfully requests that its Petition for a Writ of Certiorari be GRANTED.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 61,854

VON DEE GRAGG, Petitioner,

vs.

STATE OF FLORIDA, Respondent

[April 7, 1983]

BOYD, J.

This case is before us to review a decision of a district court of appeal, State v. Gragg, 409 So.2d 1127 (Fla. 4th DCA 1982), which passed upon a question certified to be of great public importance. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Appellant Von Dee Gragg was charged in a three-count information with (1) aggravated assault by use of a firearm;

(2) possession of a firearm by a convicted felon; and (3) aggravated assault by use of a firearm. Before trial Gragg moved for and obtained a severance of the count charging him with possession of a firearm by a convicted felon. The case proceeded to a jury trial on the two remaining counts. At the trial the victim testified that Gragg at first beat him with a pistol and then later beat him with his fists. Gragg admitted to hitting the victim with his fists, but denied having possessed a pistol on the night in question. None of the other witnesses who were at the scene saw a pistol.

During its deliberations the jury asked: "[D]oes the [d]efendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery?" Because the information charged aggravated battery and aggravated assault with a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that defendant used such a weapon. The jury found Gragg guilty of the lesser included offenses of simple battery and simple assault.

After trial the trial court granted the defense motion to dismiss the remaining count--charging possession of a

firearm--on the ground of collateral estoppel. The state appealed this decision to the district court of appeal, arguing that the doctrine of collateral estoppel did not apply. The district court of appeal held that collateral estoppel did apply since the jury must have necessarily decided that at the time of the crimes Gragg did not possess a firearm. However, the district court of appeal concluded that although collateral estoppel would normally bar further prosecution for possession, Gragg was estopped from asserting this defense by his having moved to sever the count charging possession. The court then

certified as a question of great public importance:

> When a defendant successfully seeks severance for trial of one of several counts gainst him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available [?]

409 So.2d at 1130.

Before we decide this issue we must first address a question raised by the state pertaining to the applicability of the doctrine of collateral estoppel. The state contends that collateral estoppel should not act as a bar to further prosecution because simple possession of a gun was not at issue in the first trial and because the jury may have returned verdicts on the lesser charges out of

compassion, compromise, or exercise of their pardon power. It is true that on its face the jury's verdict did not specifically decide whether Gragg had possessed a gun. However, the United States Supreme Court has stated that

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe v. Swenson, 397 U.S. 436, 444 (1970)

(footnote omitted) (quoting Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960)). Therefore, the test to determine whether collateral estoppel acts as a bar to further prosecution is not whether the factual issue in question was inherently decided by the jury's prior verdict, but rather whether such factual issue was actually decided by the jury in reaching its verdict.

The district court of appeal correctly concluded that the jury actually decided that Gragg did not have a gun. The only evidence of Gragg's having possessed a pistol was the victim's testimony that

Gragg used a pistol to hit him. Since the jury, by finding Gragg guilty of the lesser included offenses of simple assault and battery, acquitted Gragg of aggravated assault and battery, it must have concluded that Gragg did not hit the victim with a pistol. Since there was no evidence other than the victim's testimony, that Gragg possessed a pistol that night, the jury must have actually decided that Gragg did not have a pistol.

In response to the state's argument that the jury's verdict could have been a result of compassion or compromise, the district court of appeal found no evidence that the jury exercised its pardon power. The state argues that there was evidence

there is any evidence to support the view that the jury may have exercised its pardon power. Practically every jury verdict of acquittal is susceptible to such an interpretation. A jury's verdict may possibly be based upon a defendant's demeanor or other matters not reflected by the record. For this reason courts should not speculate on whether the jury has reached its verdict through compassion or compromise. In determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested. Since we

which may have caused the jury to act leniently. The state points out ther Gragg testified that the victim had struck and kicked at him first and that later he was very sorry for having hit the victim. There was also evidence that Gragg confronted the victim because the victim had struck a woman friend of Gragg's earlier in the evening. Hence there does seem to be some evidence to support the view that the jury exercised its pardon power.

However, we do not find such evidence relevant to the question of whether collateral estoppel should apply. Collateral estoppel does not depend on whether

have already found that there was no factual basis, other than Gragg's not having possessed a pistol, for the jury's not finding him guilty of aggravated assault and battery, we hold that collateral estoppel bars the state from relitigating this issue.

As for the question that was certified by the district court of appeal, we hold that a defendant is not estopped from asserting collateral estoppel as a defense to a charge after having sought and been granted a severance of the charge from other charges. The district court of appeal reached its holding that a defendant who successfully moves to

sever one count from the others is estopped from asserting collateral estoppel as a defense by extrapolating from the decision of Jeffers v. United States, 432 U.S. 137 (1977). In Jeffers the appellant was indicted, along with nine other persons, for conspiracy to distribute heroin and cocaine in violation of title 21, United States Code, section 846 (1970). A second indictment charged appellant alone with conducting a continuing criminal enterprise to violate the drug laws in violation of section 848 of the same statute. When the government moved to consolidate the two cases, Jeffers and his nine codefendants

objected. The trial court denied the government's motion and a trial was held under the first indictment. The jury found Jeffers and six of the codefendants guilty. Meanwhile Jeffers filed a motion to dismiss the second indictment on the ground of double jeopardy. He argued that the section 846 conspiracy charge was a lesser included offense of the section 848 continuing-criminal-enterprise charge. The trial court agreed with the government's contention that the two charges were separate offenses and denied the motion. Jeffers was found guilty at the second trial. The Court of Appeals affirmed.

On appeal, Justice Blackmun, writing for four members of the Court, found that conspiracy under section 846 was a lesser included offense of the section 848 crime. Justice Blackmun noted that under Brown v. Ohio, 432 U.S. 161 (1977), decided that same day, the Court had established the "general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense." 432 U.S. at 150. Justice Blackmun then stated that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no

violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." Id. at 152 (footnote omitted). With Justice White concurring on other grounds, the Court upheld the second conviction.

We do not find the Jeffers decision to be dispositive for two main reasons. First, as already noted, the statement that the Double Jeopardy Clause does not apply when a defendant elects to have two offenses tried separately was concurred in by only four members of the Court. Four other members dissented to such a holding, and the ninth, Justice

White, did not address the issue by deciding the case on other grounds. Thus the statement is merely dicta and is not an actual holding of the Court.

Secondly, Justice Blackmun's plurality opinion, in finding that Jeffers had moved for a severance.

> Petitioner argues that a finding of waiver is inconsistent with the decision in Simmons v. United States, 390 U.S. 377, 389-394 (1968), where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a Rule 14 severance from the other defendants, the case might be different.

Id. at 153 n. 21.

In the case at hand, the district

court of appeal's decision would result in requiring Gragg to waive one constitutional right in order to assert another. Gragg moved to have the possession count severed so that evidence of his prior conviction could not be introduced so as to deprive him of his constitutional right to a fair trial. See State v. Vazquez, 419 So.2d 1088 (Fla. 1982). It would be unfair to encumber or restrict the exercise of this right by requiring him to waive his right against double jeopardy. Therefore, we hold that a defendant who successfully severs one charge from other charges is not estopped from asserting collateral estoppel as a bar to further prosecution under the

severed charge.

We therefore quash the district court of appeal's decision and remand this case with instructions that the trial judge's order of dismissal be reinstated.

It is so ordered.

ADKINS, OVERTON and EHRLICH, JJ., Concur
ALDERMAN, C.J. and McDONALD, J., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case No. 80-1898

Ronald P. Gossett of Hodges, Gosset, McDonald and Gossett, Hollywood, Florida

for Petitioner

Jim Smith, Attorney General and Joy B. Shearer, Assistant Attorney General, West Palm Beach, Florida,

For Respondent

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

v.

CASE NO. 80-1898

VON DEE GRAGG,

Appellee.

- - - - - - - - - - - -

Opinion filed February 10, 1982

Appeal from the Circuit Court for Broward County; Russell E. Seay, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellant.

Ronald P. Gossett of Hodges, Gossett, McDonald & Gossett, P.A., Hollywood, for appellee.

HERSEY, J.

The state appeals from an order dismissing one count of an Information filed against appellee. The basis for dismissal

was application of the doctrine of collateral estoppel. We reverse.

This, apparently, is a case of first impression and presents a very troublesome issue. In order to gain an insight into that issue we consider first the procedural framework and then the factual background which gave rise to this problem at the trial court level.

The appellee was charged by Information with aggravated battery by use of a firearm (in Count I), possession of a firearm by a convicted felon (in Count II), and aggravated assault by use of a firearm (in Count III). Prior to trial, appellee filed a motion to sever Count II on the grounds that proof of a prior

felony conviction, which was an essential element of the Count II offense, would be prejudicial to him in the trial of the other counts. The trial court granted this motion to sever.

The case went to trial on Counts I and III. Prior to reaching a verdict, the jury asked the following question: "[D]oes the defendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery." Because the Information charged aggravated battery and aggravated assault by use of a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that appellee used such a deadly weapon. The

jury then returned a verdict of guilty of the lesser included offenses of battery and assault.

Appellee thereafter filed a motion to dismiss Count II of the Information on the basis that, by its verdict, the jury had determined that he did not possess a firearm on the evening in question, reasoning that under the principle of collateral estoppel, Count II should be dismissed. The trial court agreed and entered the order now on appeal.

The principle of collateral estoppel mandates that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

parties in any future lawsuit. This rule of law is applicable in criminal cases as it is embodied in the Fifth Amendment guarantee against double jeopardy. Thus, when there is a previous general verdict, as is usually the case in criminal prosecutions, the court is required to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct.1189, 1194 (1970), quoting from Mayers & Yarbrough, Bis Vexari: New Trials and

and Successive Prosecutions, 74 Harv.L. Rev. 1, 38-39.

Appellee's position here is that the issue of whether he possessed a firearm (an ultimate fact) was determined in his favor by the jury verdict in the first trial. Specifically, he argues that the jury verdict finding him guilty of battery and assault rather than battery with a deadly weapon (firearm) and assault with a deadly weapon (firearm) was based upon a determination that he did not have a firearm in his possession. This is evidenced, appellee maintains, by the jury questioning whether he had to have a gun to be guilty as charged in the Information. According to appellee, then,

he cannot be tried for possession of a firearm because the issue of possession was previously determined in his favor and therefore the trial court's ruling is correct.

To test appellee's theory we review the evidentiary aspects of the "prior proceeding," in this instance, the jury trial on Counts I and III.

The events which resulted in charges being filed against appellee began with a domestic dispute between Joe Harrison and Mary Smith. Harrison testified he had been living with Mary Smith for about six months and on May 5, 1980 he had decided to move out of the house. Before leaving, he got into an argument with

Mary and a friend of hers, Debbie Woody. According to Mary and Debbie, Harrison hit Debbie, knocking her from a kitchen stool. As a result, Debbie Woody called appellee, who was a friend, and the police. The law enforcement officers arrived and remained at Mary Smith's residence until Joe Harrison left. Harrison then returned to the residence to pick up his truck after arranging to have a friend, Margaret Raines, accompany him.

Upon arriving home, Harrison realized that he did not have his key so he went to a neighbor's house to get the spare key. Harrison testified that while waiting at the neighbor's door, he heard someone call his name. He turned, and

saw appellee standing behind him with an arm raised in the air with a gun in his hand. According to Harrison, appellee was bringing his arm downwards to strike him. The neighbor testified that he had turned to go into the house and saw no one standing behind Harrison. At that point, according to Harrison, appellee jumped on him and pistol-whipped him. Harrison described the gun as a .32 or .38 chrome-plated revolver. He also testified that after beating him with the gun, appellee beat him with his fists. No one directly witnessed the fight or saw a gun. The treating physician stated that Harrison's injuries were consistent with being hit with a blunt object, a gun or

a ring.

Appellee admitted that he was involved in a fight with Harrison, but denied using or being in possession of a weapon, stating, however, that he was wearing rings on both of his hands. Appellee explained that a gun cleaning kit found in his car belonged to his wife and was probably left there from a time when he drove her to the shooting range. Mary Smith, who was with appellee when he went to Harrison's residence, testified that she did not see a weapon in appellee's possession at all throughout the evening.

The victim testified that immediately prior to being attacked by appellee he saw a gun in appellee's right hand.

Appellee then started hitting victim with the barrel of the gun. According to the victim, appellee jammed the barrel of the gun under his (victim's) chin. The victim testified that, from looking at the barrel, he could identify the gun as a revolver. He further described the firearm as chrome-plated with a short barrel. Thus, there was more than sufficient evidence from which the jury could have concluded that appellee was in possession of a gun, but there was also evidence to support appellee's contentions.

Failure of the jury to convict appellee of the gun-related offenses charged strongly suggests that they did not believe the testimony of certain witnesses.

In any event, the jury clearly was presented with the issue of whether appellee used a gun in perpetrating the assault and battery. It seems to us by necessary implication that the jury considered, and rejected, appellee's possession of a gun. This is so because a rational jury, on these facts, could not have separated the two issues.

Further, we do not ascribe to the state's view that the jury exercised its pardon power or acted out of compassion or through compromise, in the absence of a scintilla of evidence that the verdict resulted from one of those factors.

Without more, then, collateral estoppel would bar appellee's prosecution

on Count II. No question of jeopardy attaching has been or could be raised on these facts. See, e.g., State v. McCord, 402 So.2d 1147 (Fla. 1981).

There remains for our consideration the state's alternative position on appeal, to the effect that appellee is estopped from claiming application of the doctrine of collateral estoppel by his own actions. Put simply, appellee moved for severance of Count II in order to avoid prejudice at trial. He should not now escape prosecution on that count on the double jeopardy principle embodied in collateral estoppel. He, himself, should be estopped since jeopardy exists twice only because of his own actions.

We have been unable to find convincing authority on the precise issue involved here. However, in the closely related area of double jeopardy, the Supreme Court of the United States has applied estoppel under procedural facts similar to those with which we are confronted.

In Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207 (1977), the Supreme Court held that although a defendant is normally entitled to have charges on greater and lesser offenses resolved in one proceeding, Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977), there is no violation of the double jeopardy clause when he elects to have the two offenses tried separately and persuades the trial

court to honor his election. Applying Jeffers to the instant case, the state argues that since the offenses were properly joined but appellee moved and persuaded the trial court to sever them, there is no violation of the double jeopardy clause to invoke the principle of collateral estoppel.

The charges against defendant were in fact properly joined because they were based on the same transaction or connected acts or transactions. Fla.R.CrimP. 3.150(a). Thus appellee's actions brought about the present situation involving the question of collateral estoppel. By logical extension Jeffers is authority for our present holding that appellee cannot

now claim the benefit of collateral estoppel.

We are not unmindful of the argument that our holding may be said to penalize the appellee for the exercise of one constitutional right by denying another but, as in Jeffers, supra, we accept the logic but deny the equity of that argument here.

Accordingly, we reverse the order of the trial court dismissing Count II of the information and remand for further appropriate proceedings.

Because we proceed by logical extension of a principle gleaned from federal precedent, necessitated by the virtual vacuum in Florida law on the point involved, we certify the following question

to our supreme court as one of great public interest:

> When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available.

REVERSED, REMANDED and QUESTION CERTIFIED.

LETTS, C.J., and ANSTEAD, J., concur.

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ALEXANDER L. STEVAS
CLERK

CASE NO. 82-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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STATE OF FLORIDA,

Petitioner,

v.

VON DEE GRAGG,

Respondent.

---

On Writ of Certiorari to the
Supreme Court of the
State of Florida

---

# RESPONSE TO JURISDICTIONAL STATEMENT FOR PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I

SINCE JEFFERS V. UNITED STATES, 432 U.S. 137 (1977) IS A PLURALITY DECISION OF THIS COURT, THERE CAN BE NO DECISION BY ANY COURT, INCLUDING THIS ONE, THAT CONFLICTS WITH JEFFERS.

II

THE SUPREME COURT OF THE STATE OF FLORIDA HAS RAISED A FEDERAL QUESTION, AND THIS COURT MUST NOW DECIDE WHETHER THE QUESTION IS SUBSTANTIAL ENOUGH TO WARRANT REVIEW BY THIS COURT.

III

ALL THREE LEVELS OF THE FLORIDA COURTS HAVE PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL AND HAVE CREATED NO CONFLICT WITH ANY FEDERAL DECISION REGARDING THE SAME.

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ABBREVIATIONS:

"T" = Transcript of trial held October 2, 3, and 6, 1980.

## OPINIONS BELOW

Respondent is satisfied with their presentation by Petitioner.

## STATEMENT OF THE CASE

This case is before this Court on the Petition for Writ of Certiorari filed by STATE OF FLORIDA seeking to have this Court review the opinion of the Supreme Court of the State of Florida upholding the trial court's application of the doctrine of collateral estoppel which resulted in a dismissal of one count of a multi-count Information. Petitioner's basis for this Court's jurisdiction to entertain the Petition for Writ of Certiorari is federal question review pursuant to 28 U.S.C. §1257(3).

Respondent was charged in a three-count Information with aggravated battery (Count I), possession of a firearm by a convicted felon (Count II), and aggravated assault (Count III). Prior to trial, Respondent obtained a severance of

Count II from the other Counts, and the case proceeded to trial at the STATE'S election on Counts I and III. The jury returned verdicts of guilty of the lesser included offenses of simple assault and simple battery.

Subsequently, Respondent moved to dismiss Count II of the Information on the basis of collateral estoppel asserting that the jury, in the trial of Counts I and III, determined that Respondent was not in possession of a firearm at the time alleged in Count II, and that therefore the STATE, because of the application of the doctrine of collateral estoppel, could not prove an essential element of Count II, to wit: That Respondent was in possession of a firearm on the date and at the time alleged. The trial court granted Respondent's Motion

to Dismiss based upon the application of the doctrine of collateral estoppel.

On the first appellate review of this case, the Fourth District Court of Appeal of Florida determined that the jury considered, and rejected, Respondent's possession of a gun, and that, without more, collateral estoppel would bar Respondent's prosecution on Count II. However, the Fourth District Court of Appeal determined that Respondent had, by his own actions, necessitated the two separate, prospective trials, and that he, therefore, was estopped to assert the doctrine of collateral estoppel. The Fourth District Court of Appeal certified to the Supreme Court of the State of Florida the following question:

> "When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel

> as a bar to prosecution on that count where it otherwise would be available."

On review by the Supreme Court of the State of Florida based upon the question certified to it by the lower appellate court to be one of great public importance, the Supreme Court of the State of Florida determined that the District Court of Appeal's decision would result in requiring Respondent to waive one Constitutional right in order to assert another. That court reasoned that it would be unfair to encumber or restrict the exercise of his Constitutional right to a fair trial by requiring him to waive his right of collateral estoppel engrafted upon the double jeopardy provision of the Fifth Amendment to the Constitution of the United States. Accordingly, the Supreme Court of the State of Florida quashed the lower

appellate court's decision and remanded the case with instructions that the trial judge's Order of Dismissal be reinstated.

## STATEMENT OF THE FACTS

The events on May 5, 1980, which resulted in charges being filed against the Respondent, began with a domestic dispute between Joe Harrison, and a woman named Mary Smith. At the trial on Counts I and III of the Information, Harrison testified he had been living with Mary Smith for about six months and on May 5, 1980, he had decided to move out of her house. (T-131, 133.) Before leaving, he got into an argument with Mary and a friend of hers, Debbie Woody (T-138, 142), and struck Debbie Woody knocking her from a kitchen stool. (T-294.) As a result, Debbie Woody called the police (T-296), and the Respondent (T-296). The police remained at Mary Smith's residence until Joe Harrison left. (T-143.) Mr. Harrison returned to the residence to

pick up his personal belongings. He had arranged to have his girlfriend, Margaret Raines, meet him at his new residence, ride with him to his car to a rootbeer stand, and wait for his return there while he rode with the police to Mary Smith's house. (T-144.)

When he arrived at his new residence, Mr. Harrison realized that he did not have his key, so he went next door to let his neighbors know that he would be breaking into the house through a side window. (T-221.) His neighbors advised him that they had a key and that if he would wait they would get it. (T-221.) While waiting at the neighbor's house, Mr. Harrison testified that he heard someone call his name, he turned, and the Respondent was standing behind him with his arm raised in the air with a gun in it, bringing it downwards to strike Mr.

Harrison. (T-146.) The neighbor testified that he had turned to go into the house when Mr. Harrison turned to go back to his house, and he saw no one standing behind Mr. Harrison. (T-222.)

Respondent denied approaching Mr. Harrison in such a fashion, denied striking him with any weapon or any object other than his fists which were adorned with rings, and testified that his striking Mr. Harrison was in self-defense. (T-326, 320-330.) The physician who treated Mr. Harrison testified his injuries were consistent with being hit with a blunt object, which could have been the rings that Respondent wore during the fight or a pistol. (T-70, 78.)

The only testimony in the trial that Mr. Gragg was in possession of a firearm on May 5, 1980, came from Mr. Harrrison

who testified he saw the gun for the first time as Mr. Gragg was about to hit him with it, and for the last time when the first skirmish was over. (T-146-150.)

Mary Smith traveled with Mr. Gragg to Mr. Harrison's new residence, was with Mr. Gragg throughout the stay at Mr. Harrison's residence, and returned to Mary Smith's house with Mr. Gragg. (T-262-273.) She testified that she did not see a weapon in his possession at all throughout the night. (T-263.) The other witnesses who were at the scene testified that they did not see a gun in Mr. Gragg's possession. (T. 117, 212-213, 228.)

When the Respondent was arrested, he was in his car with Mary Smith the day following the above described incident. (T-97-87, 101.) There was no gun in the

car. (T-101.) There was a gun cleaning kit owned by Respondent's wife in the car, with conflicting evidence as to whether or not it was in the front seat, back seat or on the floor. (T-100.) The Respondent voluntarily explained to the police why the gun cleaning kit was in the car, explaining that his wife owned two guns (T-367) and the kit was probably left in the car from when his wife had gone to the shooting range. (T-337.)

Beyond the initial search of Respondent's automobile at the time and place of his arrest, the STATE never attempted to find the gun allegedly possessed and used by Respondent and, accordingly, presented no such weapon at the trial.

## SUMMARY OF ARGUMENT

The decision of the Supreme Court of the State of Florida does not conflict with Jeffers v. United States, 432 U.S. 137 (1977) since Jeffers is a plurality decision thereby establishing no principle of law. The question passed upon by the Supreme Court of the State of Florida involves a federal question, to wit: Whether or not a defendant in a criminal case must waive his right to apply the doctrine of collateral estoppel (which has been characterized as being "engrafted upon" the Fifth Amendment protection against double jeopardy) in order to assert his Fourth Amendment right to a fair trial. Respondent recognizes this question to be one of significance, but additionally recognizes that he cannot vest this Court with

jurisdiction by conceding that this Court should review the principle of law established by the decision of the Supreme Court of the State of Florida.

Respondent asserts that there is ample federal law to guide the appropriate courts in the application of the doctrine of collateral estoppel in criminal cases and, since this Court has previously declined to review one such case that is generally recognized that is being precedential and authoritative (United States v. Larkin, 605 F.2d 1360, 1363 (5th Cir. 1979)), this Court should likewise decline to review this case.

Finally, Respondent asserts that all three levels of the state courts that have decided this case have correctly applied the doctrine of collateral estoppel.

## ARGUMENT

### I

SINCE JEFFERS V. UNITED STATES, 432 U.S. 137 (1977) IS A PLURALITY DECISION OF THIS COURT, THERE CAN BE NO DECISION BY ANY COURT, INCLUDING THIS ONE, THAT CONFLICTS WITH JEFFERS.

The first reason presented by the Petitioner for granting the Writ of Certiorari is that the decision of the Supreme Court of the State of Florida is in conflict with this Court's decision in Jeffers v. United States, 432 U.S. 137 (1977).[1] (Petition, p. 11.)

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[1] While the first question presented for review in the Petition for Writ of Certiorari contained on page i of the Petition is directly contradicted by point I as phrased by Petitioner on page 11 of the Petition, Respondent answers the Petition under the assumption that there is an error in the phraseology of point I on page 11. The error appears to Respondent to be in the use of the word "applicable" as opposed to "inapplicable".

Jeffers is a plurality decision. Justice Blackmun announced the judgment of the Court and an opinion in which the Chief Justice, Justice Powell and Justice Rehnquist, joined. Justice White concurred in the judgment in part and dissented in part. Justice Stevens, with whom Justice Brennan, Justice Stewart and Justice Marshall joined, dissented in part and concurred in the judgment in part. (See also Justice White's concurrence and dissent in which he described the opinion as a plurality opinion.) Ibid, p. 158.

This Court will affirm a decision if a majority of the Justices vote in favor of affirmance, even though no one opinion commands the concurrence of a majority of the Justices. U. S. v. Jorn, 400 U.S. 470 (1971); Adams v. Illinois, 405 U.S. 278 (1972); Apodaca v. Oregon, 406 U.S.

404 (1972); Atchison, T. & S. F. R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973); Gosa v. Mayden, 413 U.S. 665 (1973). In such a case, no principle of law is settled by the affirmance. Etting v. President, Directors & Co. of Bank, 24 U.S. 59 (1826); Laird v. Tatum, 409 U.S. 824 (1972).

It is axiomatic that Jeffers must contain a settled principle of law for any case to be in conflict with it. Since it does not, by virtue of it being a plurality decision, no case can conflict with it.

Respondent takes exception to Petitioner's statement that the Supreme Court of the State of Florida "recogniz[ed] that Jeffers was on point, . . ." (Petition, p. 14.) Nowhere in its decision does the Supreme Court of the State of Florida recognize Jeffers as

being on point with the issues presented.

The STATE OF FLORIDA offers no other case with which the decision of the Supreme Court of the State of Florida conflicts. Apparently, the STATE OF FLORIDA relies solely upon Jeffers as its basis for "conflict jurisdiction". Accordingly, there being no conflict with a decision of this Court, certiorari should not be granted.

II

THE SUPREME COURT OF THE STATE OF FLORIDA HAS RAISED A FEDERAL QUESTION, AND THIS COURT MUST NOW DECIDE WHETHER THE QUESTION IS SUBSTANTIAL ENOUGH TO WARRANT REVIEW BY THIS COURT.

Since the principle of collateral estoppel is "engrafted upon" the double jeopardy clause of the Fifth Amendment, this case certainly involved a federal question. Ashe v. Swenson, 397 U.S. 436

(1970); United States v. Larkin, 605 F.2d 1360, 1363 (5th Cir. 1979).

In order to sustain Supreme Court jurisdiction under 28 U.S.C. §1257(3) to review a state court decision, a federal question may not be one of mere form. Cuyahoga River Power Co. v. Northern Traction & Light Co., 252 U.S. 388 (1920). The question must be real and substantial. Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902); Zucht v. King, 260 U.S. 174 (1922); Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952).

A party seeking review in the Supreme Court bears the burden of affirmatively establishing the court's jurisdiction, and any doubts as to the existence of that jurisdiction are to be resolved against that party. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62

(1948). The jurisdiction of the Supreme Court cannot be established by the consent or acquiescence of the parties. Mills v. Brown, 41 U.S. 525 (1842); New York ex rel Bryant v. Zimmerman, 278 U.S. 63 (1928).

While Respondent recognizes that the question of waiving one Constitutional right by asserting another is an extremely important question in criminal law, Respondent does not have the power to concede jurisdiction.

However, in its Petition for Writ of Certiorari, and particularly in point II therein, the STATE OF FLORIDA continues to ignore the distinction between double jeopardy and collateral estoppel. Although double jeopardy necessarily includes collateral estoppel, collateral estoppel does not equate with or include double jeopardy. United States v. Mock,

604 F.2d 341 (5th Cir. 1979); United States v. Caucci, 635 F.2d 441 (5th Cir. 1981). Collateral estoppel involves the establishment of a fact once and for all, while double deopardy deals with a procedural bar to a second trial. Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979).

Yet, all of the arguments offered by the STATE OF FLORIDA to carry the STATE'S burden of affirmatively establishing this Court's jurisdiction are founded upon double jeopardy arguments and not that of collateral estoppel.

The STATE argues that it has been "penalized" (brief, p. 18) by a defendant who has obtained a severance to preserve his Constitutional right to a fair trial on two of the three counts against him, and who has submitted to the jury for its

determination whether or not the defendant used, and therefore possessed, a firearm. Respondent respectfully suggests that there is no penalty involved in the STATE, having had an opportunity to prove an ultimate fact, being forced to live with a jury's determination of that fact. In this case, the jury determined that Respondent did not use, and therefore did not possess, a firearm. The STATE seeks to have a second bite of the apple to try to convince a different jury what it could not prove to the first jury. The doctrine of collateral estoppel arose to prevent that second bite of the apple and to give significant meaning to jury decisions.

There presently exists sufficient federal law on the application of the doctrine of collateral estoppel that the state and federal forums can be guided in

its application. See Ashe v. Swenson, 397 U.S. 436 (1970); United States v. Larkin, 605 F.2d 1360 (5th Cir. 1979) modified 611 F.2d 585 (5th Cir. 1980), U.S. cert. den., 446 U.S. 939.

Since it appears as though this Court has once before rejected the opportunity to review the application of the doctrine of collateral estoppel in a somewhat similar factual situation, it would seem inconsistent for this Court to grant certiorari to review this case. United States v. Larkin, supra.

III

ALL THREE LEVELS OF THE FLORIDA COURTS HAVE PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL AND HAVE CREATED NO CONFLICT WITH ANY FEDERAL DECISION REGARDING THE SAME.

The STATE refuses to accept the fact that possession of a firearm by Respondent (an ultimate fact) was determined against the STATE by the jury in the

first trial. The trial court has so held in its Order of Dismissal. The Fourth District Court of Appeal has so held (A-23 through A-29), and the Supreme Court of the State of Florida has so held (A-7 through A-10.) All have done so because in the unique factual situation of this case, a rational jury cannot separate the possession of a firearm from the use of the firearm based upon the evidence presented to said jury. Since the jury necessarily decided that Respondent did not use the firearm, (thus its verdict of guilty of the lesser included offenses of simple assault and simple battery), and since it cannot separate use from possession, the jury necessarily decided that Respondent did not possess a firearm.

All three levels of the state court passing upon this question have applied

the Doctrine of Collateral Estoppel pursuant to this Court's statement in Ashe v. Swenson, 397 U.S. 436, 444 (1970);

> "Where a previous judgment of acquittal was based upon a general verdict as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of their proceedings.'" Sealfon v. United States, 332 U.S. 575, 579, 68 S.Ct. 237, 240.

In fact, most of the written opinion from the Fourth District Court of Appeal was its examination of the trial record regarding the issue of use and therefore possession of a firearm. (A-22 through A-29). After this thorough examination,

the Fourth District Court of Appeal concluded that:

> "It seems to us by necessary implication that the jury considered, and rejected, appellee's possession of a gun. This is so because a rational jury, on these facts, could not have separated the two issues." (A-29.)

The STATE again argued the distinction between possession and use to the Supreme Court of the State of Florida. That court similarly conducted a thorough review of the record and determined that:

> "The district court of appeal correctly concluded that the jury actually decided that Gragg did not have a gun. . . . Since there was no evidence other than the victim's testimony, that Gragg possessed a pistol that night, the jury must have actually decided that Gragg did not have a pistol." (A-7 through A-8.)

Just as in Ashe v. Swenson, 397 U.S. 436 (1970), where an ultimate fact (i.e.

identity) was conclusively determined against the State in the first trial, and therefore the State could not prosecute the same defendant in a second trial arising out of the same circumstances, in this case an ultimate fact (i.e. possession of a firearm) has been determined against the STATE and, since possession of a firearm is an essential element of the only remaining count against Respondent, that count was properly dismissed against Respondent. The STATE could not gain a successful conviction where it could not prove one of the essential elements of the crime charged.

It would be fruitless, a waste of judicial time and public funds to, as the STATE suggests in its brief, require a trial to determine whether Respondent is entitled to invoke collateral estoppel.

The doctrine, itself, precludes such a tail-chasing act.

## CONCLUSION

Based upon the foregoing, Respondent requests that the Petition for a Writ of Certiorari filed by the STATE OF FLORIDA be denied.

Respectfully submitted,

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SUPREME COURT OF FLORIDA

No. 61,854

VON DEE GRAGG, Petitioner,

vs.

STATE OF FLORIDA, Respondent

[April 7, 1983]

BOYD, J.

This case is before us to review a decision of a district court of appeal, State v. Gragg, 409 So.2d 1127 (Fla. 4th DCA 1982), which passed upon a question certified to be of great public importance. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Appellant Von Dee Gragg was charged in a three-count information with (1) aggravated assault by use of a firearm;

(2) possession of a firearm by a convicted felon; and (3) aggravated assault by use of a firearm. Before trial Gragg moved for and obtained a severance of the count charging him with possession of a firearm by a convicted felon. The case proceeded to a jury trial on the two remaining counts. At the trial the victim testified that Gragg at first beat him with a pistol and then later beat him with his fists. Gragg admitted to hitting the victim with his fists, but denied having possessed a pistol on the night in question. None of the other witnesses who were at the scene saw a pistol.

During its deliberations the jury asked: "[D]oes the [d]efendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery?" Because the information charged aggravated battery and aggravated assault with a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that defendant used such a weapon. The jury found Gragg guilty of the lesser included offenses of simple battery and simple assault.

After trial the trial court granted the defense motion to dismiss the remaining count--charging possession of a

firearm--on the ground of collateral estoppel. The state appealed this decision to the district court of appeal, arguing that the doctrine of collateral estoppel did not apply. The district court of appeal held that collateral estoppel did apply since the jury must have necessarily decided that at the time of the crimes Gragg did not possess a firearm. However, the district court of appeal concluded that although collateral estoppel would normally bar further prosecution for possession, Gragg was estopped from asserting this defense by his having moved to sever the count charging possession. The court then

certified as a question of great public importance:

> When a defendant successfully seeks severance for trial of one of several counts gainst him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available [?]

409 So.2d at 1130.

Before we decide this issue we must first address a question raised by the state pertaining to the applicability of the doctrine of collateral estoppel. The state contends that collateral estoppel should not act as a bar to further prosecution because simple possession of a gun was not at issue in the first trial and because the jury may have returned verdicts on the lesser charges out of

compassion, compromise, or exercise of their pardon power. It is true that on its face the jury's verdict did not specifically decide whether Gragg had possessed a gun. However, the United States Supreme Court has stated that

> the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

Ashe v. Swenson, 397 U.S. 436, 444 (1970)

(footnote omitted) (quoting Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38-39 (1960)). Therefore, the test to determine whether collateral estoppel acts as a bar to further prosecution is not whether the factual issue in question was inherently decided by the jury's prior verdict, but rather whether such factual issue was actually decided by the jury in reaching its verdict.

The district court of appeal correctly concluded that the jury actually decided that Gragg did not have a gun. The only evidence of Gragg's having possessed a pistol was the victim's testimony that

Gragg used a pistol to hit him. Since the jury, by finding Gragg guilty of the lesser included offenses of simple assault and battery, acquitted Gragg of aggravated assault and battery, it must have concluded that Gragg did not hit the victim with a pistol. Since there was no evidence other than the victim's testimony, that Gragg possessed a pistol that night, the jury must have actually decided that Gragg did not have a pistol.

In response to the state's argument that the jury's verdict could have been a result of compassion or compromise, the district court of appeal found no evidence that the jury exercised its pardon power. The state argues that there was evidence

which may have caused the jury to act leniently. The state points out ther Gragg testified that the victim had struck and kicked at him first and that later he was very sorry for having hit the victim. There was also evidence that Gragg confronted the victim because the victim had struck a woman friend of Gragg's earlier in the evening. Hence there does seem to be some evidence to support the view that the jury exercised its pardon power.

However, we do not find such evidence relevant to the question of whether collateral estoppel should apply. Collateral estoppel does not depend on whether

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there is any evidence to support the view that the jury may have exercised its pardon power. Practically every jury verdict of acquittal is susceptible to such an interpretation. A jury's verdict may possibly be based upon a defendant's demeanor or other matters not reflected by the record. For this reason courts should not speculate on whether the jury has reached its verdict through compassion or compromise. In determining whether collateral estoppel applies, a court should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested. Since we

have already found that there was no factual basis, other than Gragg's not having possessed a pistol, for the jury's not finding him guilty of aggravated assault and battery, we hold that collateral estoppel bars the state from relitigating this issue.

As for the question that was certified by the district court of appeal, we hold that a defendant is not estopped from asserting collateral estoppel as a defense to a charge after having sought and been granted a severance of the charge from other charges. The district court of appeal reached its holding that a defendant who successfully moves to

sever one count from the others is estopped from asserting collateral estoppel as a defense by extrapolating from the decision of Jeffers v. United States, 432 U.S. 137 (1977). In Jeffers the appellant was indicted, along with nine other persons, for conspiracy to distribute heroin and cocaine in violation of title 21, United States Code, section 846 (1970). A second indictment charged appellant alone with conducting a continuing criminal enterprise to violate the drug laws in violation of section 848 of the same statute. When the government moved to consolidate the two cases, Jeffers and his nine codefendants

objected. The trial court denied the government's motion and a trial was held under the first indictment. The jury found Jeffers and six of the codefendants guilty. Meanwhile Jeffers filed a motion to dismiss the second indictment on the ground of double jeopardy. He argued that the section 846 conspiracy charge was a lesser included offense of the section 848 continuing-criminal-enterprise charge. The trial court agreed with the government's contention that the two charges were separate offenses and denied the motion. Jeffers was found guilty at the second trial. The Court of Appeals affirmed.

On appeal, Justice Blackmun, writing for four members of the Court, found that conspiracy under section 846 was a lesser included offense of the section 848 crime. Justice Blackmun noted that under Brown v. Ohio, 432 U.S. 161 (1977), decided that same day, the Court had established the "general rule that the Double Jeopardy Clause prohibits a State or the Federal Government from trying a defendant for a greater offense after it has convicted him of a lesser included offense." 432 U.S. at 150. Justice Blackmun then stated that "although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no

violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election." Id. at 152 (footnote omitted). With Justice White concurring on other grounds, the Court upheld the second conviction.

We do not find the Jeffers decision to be dispositive for two main reasons. First, as already noted, the statement that the Double Jeopardy Clause does not apply when a defendant elects to have two offenses tried separately was concurred in by only four members of the Court. Four other members dissented to such a holding, and the ninth, Justice

White, did not address the issue by deciding the case on other grounds. Thus the statement is merely dicta and is not an actual holding of the Court.

Secondly, Justice Blackmun's plurality opinion, in finding that Jeffers had moved for a severance.

> Petitioner argues that a finding of waiver is inconsistent with the decision in Simmons v. United States, 390 U.S. 377, 389-394 (1968), where the Court held that a defendant could not be required to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert an arguably valid Fourth Amendment claim. In petitioner's case, however, the alleged Hobson's choice between asserting the Sixth Amendment fair trial right and asserting the Fifth Amendment double jeopardy claim is illusory. Had petitioner asked for a Rule 14 severance from the other defendants, the case might be different.

Id. at 153 n. 21.

In the case at hand, the district

court of appeal's decision would result in requiring Gragg to waive one constitutional right in order to assert another. Gragg moved to have the possession count severed so that evidence of his prior conviction could not be introduced so as to deprive him of his constitutional right to a fair trial. See State v. Vazquez, 419 So.2d 1088 (Fla. 1982). It would be unfair to encumber or restrict the exercise of this right by requiring him to waive his right against double jeopardy. Therefore, we hold that a defendant who successfully severs one charge from other charges is not estopped from asserting collateral estoppel as a bar to further prosecution under the

severed charge.

We therefore quash the district court of appeal's decision and remand this case with instructions that the trial judge's order of dismissal be reinstated.

It is so ordered.

ADKINS, OVERTON and EHRLICH, JJ., Concur
ALDERMAN, C.J. and McDONALD, J., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case No. 80-1898

Ronald P. Gossett of Hodges, Gosset, McDonald and Gossett, Hollywood, Florida

for Petitioner

Jim Smith, Attorney General and Joy B. Shearer, Assistant Attorney General, West Palm Beach, Florida,

For Respondent

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA,

Appellant,

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

v.

CASE NO. 80-1898

VON DEE GRAGG,

Appellee.

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Opinion filed February 10, 1982

Appeal from the Circuit Court for Broward County; Russell E. Seay, Jr., Judge.

Jim Smith, Attorney General, Tallahassee, and Joy B. Shearer, Assistant Attorney General, West Palm Beach, for appellant.

Ronald P. Gossett of Hodges, Gossett, McDonald & Gossett, P.A., Hollywood, for appellee.

HERSEY, J.

The state appeals from an order dismissing one count of an Information filed against appellee. The basis for dismissal

was application of the doctrine of collateral estoppel. We reverse.

This, apparently, is a case of first impression and presents a very troublesome issue. In order to gain an insight into that issue we consider first the procedural framework and then the factual background which gave rise to this problem at the trial court level.

The appellee was charged by Information with aggravated battery by use of a firearm (in Count I), possession of a firearm by a convicted felon (in Count II), and aggravated assault by use of a firearm (in Count III). Prior to trial, appellee filed a motion to sever Count II on the grounds that proof of a prior

felony conviction, which was an essential element of the Count II offense, would be prejudicial to him in the trial of the other counts. The trial court granted this motion to sever.

The case went to trial on Counts I and III. Prior to reaching a verdict, the jury asked the following question: "[D]oes the defendant have to have a gun to be guilty of the information charge of aggravated assault, also aggravated battery." Because the Information charged aggravated battery and aggravated assault by use of a deadly weapon, a firearm, the trial court instructed the jury that it would have to find that appellee used such a deadly weapon. The

jury then returned a verdict of guilty of the lesser included offenses of battery and assault.

Appellee thereafter filed a motion to dismiss Count II of the Information on the basis that, by its verdict, the jury had determined that he did not possess a firearm on the evening in question, reasoning that under the principle of collateral estoppel, Count II should be dismissed. The trial court agreed and entered the order now on appeal.

The principle of collateral estoppel mandates that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

parties in any future lawsuit. This rule of law is applicable in criminal cases as it is embodied in the Fifth Amendment guarantee against double jeopardy. Thus, when there is a previous general verdict, as is usually the case in criminal prosecutions, the court is required to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe v. Swenson, 397 U.S. 436, 444, 90 S.Ct.1189, 1194 (1970), quoting from Mayers & Yarbrough, Bis Vexari: New Trials and

and Successive Prosecutions, 74 Harv.L. Rev. 1, 38-39.

Appellee's position here is that the issue of whether he possessed a firearm (an ultimate fact) was determined in his favor by the jury verdict in the first trial. Specifically, he argues that the jury verdict finding him guilty of battery and assault rather than battery with a deadly weapon (firearm) and assault with a deadly weapon (firearm) was based upon a determination that he did not have a firearm in his possession. This is evidenced, appellee maintains, by the jury questioning whether he had to have a gun to be guilty as charged in the Information. According to appellee, then,

he cannot be tried for possession of a firearm because the issue of possession was previously determined in his favor and therefore the trial court's ruling is correct.

To test appellee's theory we review the evidentiary aspects of the "prior proceeding," in this instance, the jury trial on Counts I and III.

The events which resulted in charges being filed against appellee began with a domestic dispute between Joe Harrison and Mary Smith. Harrison testified he had been living with Mary Smith for about six months and on May 5, 1980 he had decided to move out of the house. Before leaving, he got into an argument with

Mary and a friend of hers, Debbie Woody. According to Mary and Debbie, Harrison hit Debbie, knocking her from a kitchen stool. As a result, Debbie Woody called appellee, who was a friend, and the police. The law enforcement officers arrived and remained at Mary Smith's residence until Joe Harrison left. Harrison then returned to the residence to pick up his truck after arranging to have a friend, Margaret Raines, accompany him.

Upon arriving home, Harrison realized that he did not have his key so he went to a neighbor's house to get the spare key. Harrison testified that while waiting at the neighbor's door, he heard someone call his name. He turned, and

saw appellee standing behind him with an arm raised in the air with a gun in his hand. According to Harrison, appellee was bringing his arm downwards to strike him. The neighbor testified that he had turned to go into the house and saw no one standing behind Harrison. At that point, according to Harrison, appellee jumped on him and pistol-whipped him. Harrison described the gun as a .32 or .38 chrome-plated revolver. He also testified that after beating him with the gun, appellee beat him with his fists. No one directly witnessed the fight or saw a gun. The treating physician stated that Harrison's injuries were consistent with being hit with a blunt object, a gun or

a ring.

Appellee admitted that he was involved in a fight with Harrison, but denied using or being in possession of a weapon, stating, however, that he was wearing rings on both of his hands. Appellee explained that a gun cleaning kit found in his car belonged to his wife and was probably left there from a time when he drove her to the shooting range. Mary Smith, who was with appellee when he went to Harrison's residence, testified that she did not see a weapon in appellee's possession at all throughout the evening.

The victim testified that immediately prior to being attacked by appellee he saw a gun in appellee's right hand.

Appellee then started hitting victim with the barrel of the gun. According to the victim, appellee jammed the barrel of the gun under his (victim's) chin. The victim testified that, from looking at the barrel, he could identify the gun as a revolver. He further described the firearm as chrome-plated with a short barrel. Thus, there was more than sufficient evidence from which the jury could have concluded that appellee was in possession of a gun, but there was also evidence to support appellee's contentions.

Failure of the jury to convict appellee of the gun-related offenses charged strongly suggests that they did not believe the testimony of certain witnesses.

In any event, the jury clearly was presented with the issue of whether appellee used a gun in perpetrating the assault and battery. It seems to us by necessary implication that the jury considered, and rejected, appellee's possession of a gun. This is so because a rational jury, on these facts, could not have separated the two issues.

Further, we do not ascribe to the state's view that the jury exercised its pardon power or acted out of compassion or through compromise, in the absence of a scintilla of evidence that the verdict resulted from one of those factors.

Without more, then, collateral estoppel would bar appellee's prosecution

on Count II. No question of jeopardy attaching has been or could be raised on these facts. See, e.g., State v. McCord, 402 So.2d 1147 (Fla. 1981).

There remains for our consideration the state's alternative position on appeal, to the effect that appellee is estopped from claiming application of the doctrine of collateral estoppel by his own actions. Put simply, appellee moved for severance of Count II in order to avoid prejudice at trial. He should not now escape prosecution on that count on the double jeopardy principle embodied in collateral estoppel. He, himself, should be estopped since jeopardy exists twice only because of his own actions.

We have been unable to find convincing authority on the precise issue involved here. However, in the closely related area of double jeopardy, the Supreme Court of the United States has applied estoppel under procedural facts similar to those with which we are confronted.

In Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207 (1977), the Supreme Court held that although a defendant is normally entitled to have charges on greater and lesser offenses resolved in one proceeding, Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977), there is no violation of the double jeopardy clause when he elects to have the two offenses tried separately and persuades the trial

court to honor his election. Applying Jeffers to the instant case, the state argues that since the offenses were properly joined but appellee moved and persuaded the trial court to sever them, there is no violation of the double jeopardy clause to invoke the principle of collateral estoppel.

The charges against defendant were in fact properly joined because they were based on the same transaction or connected acts or transactions. Fla.R.CrimP. 3.150(a). Thus appellee's actions brought about the present situation involving the question of collateral estoppel. By logical extension Jeffers is authority for our present holding that appellee cannot

now claim the benefit of collateral estoppel.

We are not unmindful of the argument that our holding may be said to penalize the appellee for the exercise of one constitutional right by denying another but, as in Jeffers, supra, we accept the logic but deny the equity of that argument here.

Accordingly, we reverse the order of the trial court dismissing Count II of the information and remand for further appropriate proceedings.

Because we proceed by logical extension of a principle gleaned from federal precedent, necessitated by the virtual vacuum in Florida law on the point involved, we certify the following question

to our supreme court as one of great public interest:

> When a defendant successfully seeks severance for trial of one of several counts against him, will he be estopped later to assert collateral estoppel as a bar to prosecution on that count where it otherwise would be available.

REVERSED, REMANDED and QUESTION CERTIFIED.

LETTS, C.J., and ANSTEAD, J., concur.